Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses	)	WT Docket No. 12-4
Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses	)	

METROPCS COMMUNICATIONS, INC.
REPLY TO JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS

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TABLE OF CONTENTS

SUMMARY

MetroPCS Communications, Inc. (MetroPCS) is responding to the Joint Opposition to Petitions to Deny and Comments (the "Joint Opposition") filed by Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC and Cox TMI Wireless, LLC (collectively, the "Applicants") with respect to the captioned applications (the "Applications"). The MetroPCS reply demonstrates that the Applicants still have failed to provide sufficient information for the Commission to find that a grant of the Applications would serve the public interest. Indeed, the Commission has already reached this same conclusion by serving upon each of the Applicants an extensive Information and Discovery Request (the "Requests"). However, the timing of the Applicants' responses to these Requests, coupled with delays inherent in the protective order processes which govern highly confidential documents, have prevented MetroPCS and other interested parties from reviewing and commenting on these supplemental materials.

One conclusion, however, is clear: the Joint Opposition fails to resolve the serious questions posed by the Transactions. The sparse, non-representative spectrum utilization information that Verizon Wireless provides for a small, hand-picked subset of markets is patently inadequate to deflect the serious spectrum warehousing issue that has been raised. Properly viewed, the offered data is an admission that Verizon Wireless has no need for the spectrum it is acquiring in at least 77 of the top 100 markets where there are spectrum overlaps. Moreover, the use by Verizon Wireless of average national spectrum holdings and customer connections to demonstrate need is completely misguided. A market-by-market analysis is required. And, the starting point of the analysis should be the amount of spectrum Verizon Wireless has in each overlap market that is not being devoted to service to the public, and the extent to which the Transactions will add additional unused spectrum to the Verizon spectrum warehouse.

The cable companies also have failed to resolve the trafficking issue that has been raised. The Joint Opposition fails to demonstrate that the sellers – particularly SpectrumCo – acquired the AWS spectrum with a *bona fide* intention to provide service in the public interest. At this point, the motivations appear to be speculation and profitable resale – the textbook definition of trafficking.

Finally, the Applicants have failed to rebut the well-documented claims that the Transactions will have a serious negative impact on the roaming market by removing four potential roaming partners and exacerbating Verizon Wireless' unwillingness to offer roaming on commercially reasonable terms. If the other potentially fatal defects in the Applications are cured, the Commission must condition any grants on the requirement that Verizon Wireless offer roaming services to other facility-based wireless broadband carriers on financial terms no less favorable than those offered by Verizon Wireless in the resale agreements to the sellers.

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MetroPCS Communications, Inc. ("MetroPCS")[1] respectfully submits its reply to the Joint Opposition to Petitions to Deny and Comments ("Joint Opposition") filed by Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"), SpectrumCo, LLC ("SpectrumCo") and Cox TMI Wireless, LLC ("Cox") (collectively, the "Applicants") with reference to the above-captioned applications (the "Applications"). In reply, the following is respectfully shown:

I. INTRODUCTION

On February 21, 2012, MetroPCS filed its Petition to Deny which demonstrated that the Federal Communications Commission (the "Commission" or "FCC") cannot find that a grant of the Applications would serve the public interest because the Applicants have failed to provide critical information to the Commission. The Joint Opposition effectively concedes MetroPCS'

[1] For purposes of these Comments, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its FCC license-holding subsidiaries.

point by purporting to address the glaring deficiencies in the original application. However, the Applications, even as supplemented, remain patently inadequate for the Commission to find that the public interest, convenience and necessity would be served by approving the Applications. The Commission has clearly underscored this point by sending detailed Information and Discovery Requests (the "FCC Discovery") to the Applicants.[2] The inescapable conclusion is that, in their present form, the Applications must be denied.

II. THE WAREHOUSING ISSUE REMAINS

On January 25, 2012, representatives of MetroPCS met with the Commission and outlined in detail the specific information that needed to be provided by the Applicants in order for the Commission to determine whether approval of the proposed spectrum acquisition transactions (the "Transactions") would serve the public interest. Specifically, MetroPCS pointed out that Verizon Wireless holds considerable spectrum throughout the nation that apparently is not to be being put to beneficial use. MetroPCS urged the Commission, particularly in light of the current severe spectrum crunch that risks crippling the wireless industry, to require the Applicants to provide a market-by-market analysis of (1) the amount of spectrum Verizon Wireless holds in each geographic area; (2) the precise extent to which the spectrum has been placed in commercial service to serve independent subscribers; and (3) the nature of the service provided and the utilization as shown in traffic studies.[3] In essence, the

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[2] As is set forth in detail within, due to the timing of the Applicants' responses to the FCC Discovery, and the inherent delays in the processes by which counsel to adverse parties can secure unredacted versions of Highly Confidential documents, the Applicants' responses are not addressed in this reply and MetroPCS is reserving the right to review and comment on them.

[3] *See* MetroPCS *Ex Parte* Communication, WT Docket No. 12-4, at 2 (filed Jan. 27, 2012). Notably, in addition to the information identified by MetroPCS as necessary to properly evaluate the Applications, a series of other interested parties have been advocating that the Applicants needed to supply unredacted versions of the various Commercial Agreements which were

Commission has accepted the MetroPCS position by seeking detailed information from the Applicants precisely along the lines recommended by MetroPCS in the FCC Discovery. *See* discussion *infra* at pp. 5 and 14.

The Joint Opposition expressly concedes that "Verizon Wireless, like other carriers, constantly assesses whether it has sufficient spectrum in specific markets to meet the needs of its customers."[4] Specifically, Verizon Wireless "applies a demand forecast model based upon traffic data" which is informed by trends "such as average user throughput, historical device sales data, projections of future device sales, customer data usage and usage trends…"[5] Since this important information is regularly kept by Verizon Wireless in the ordinary course of its business, and is used by Verizon Wireless in its network planning, the proper approach is for Verizon Wireless, as requested by the Commission, to submit the unvarnished data for *all* of the geographic areas where there is an overlap between the spectrum that Verizon Wireless holds and the spectrum that it is seeking to acquire from SpectrumCo, Cox, and Leap.[6]

Instead of filing all of this obviously relevant and readily available information, Verizon Wireless chose to disclose in the Joint Opposition a highly selective subset of information. For

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entered into concurrently and pertain to cooperation in the sale of goods and services. By letter dated March 8, 2012, the Bureau ordered the Applicants to re-file the Commercial Agreements with fewer redactions. *See* Letter from Rick Kaplan, Wireless Telecommunications Bureau, to Michael Samsock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012) (requesting revised copies of certain agreements with specified redactions removed).

[4] Cellco Partnership d/b/a Verizon Wireless et al., Joint Opposition to Petitions to Deny and Comments in WT Docket No. 12-4, p. 16 (filed Mar. 2, 2012) ("Joint Opposition"); *see* also Joint Opposition, Ex. 2 (supplemental Declaration of William H. Stone).

[5] Joint Opposition at p. 16.

[6] In addition to seeking to acquire spectrum from SpectrumCo and Cox, Verizon Wireless is concurrently seeking to acquire AWS and PCS licenses of Cricket License Company LLC, Savary Island License A, LLC and Savary License B, LLC in a transaction with Leap Wireless International ("Leap").

example, Exhibit 2 of the Joint Opposition contains a supplemental declaration of William H. Stone which purports to apply the Verizon Wireless internal spectrum planning methodology to 18 hand-selected markets. Surprisingly, while the Joint Opposition claims that the purpose of this exercise was "to demonstrate rising spectrum constraints across the Verizon Wireless network,"[7] no pretense is made that these markets were selected on a random basis, or on a statistically valid basis, or constitute a truly representative overall sample of the Verizon Wireless near-term need for additional spectrum. Nor is any showing made that alleged congestion in these select markets necessarily translates into a need elsewhere in the Verizon Wireless network. In all, given the obviously skewed sample filed by Verizon Wireless, the only conclusion the Commission can draw from the Joint Opposition is that Verizon Wireless has no need for additional spectrum in the near term in at least 77 of the top 100 markets in which it is acquiring spectrum from SpectrumCo, Cox or Leap that overlap its current operations. Having limited its voluntary need showing to 18 markets, the Commission must conclude that no present need can be shown in the remaining markets, and the Commission should require that the spectrum Verizon Wireless is seeking to acquire in those 77 markets be divested unless the supplemental data conclusively demonstrates otherwise,

The Wireless Telecommunications Bureau (the "Bureau") must be commended for having recognized the patent inadequacy of the information provided to date by the Applicants and issuing the FCC Discovery. The Bureau's letter of March 8, 2012 to Verizon Wireless[8]

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[7] Joint Opposition at p. 18.

[8] *See* Letter from Rick Kaplan, Wireless Telecommunications Bureau, to Michael Samsock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012) (Information and Discovery Request for Verizon Wireless).

makes detailed requests for information covering much of the information originally identified by MetroPCS as essential to evaluating the warehousing claim, including:

- A list organized by state and then by county of each spectrum license to which Verizon Wireless has access that can be used in the provision of mobile wireless services broken down, *inter alia,* by spectrum band, spectrum block, the amount of spectrum and technology format. *See* Information and Discovery Request No. 2.
- Maps by bands of geographic coverage of each relevant network distinguished by technological format. *See* Information and Discovery Request No. 2.
- All plans, analyses and reports discussing the current and projected capacity and bandwidth requirements for mobile wireless service. *See* Information and Discovery Request No. 7a.
- All plans, analyses and reports discussing how Verizon Wireless plans to use the SpectrumCo spectrum including the costs and timetable. *See* Information and Discovery Request No. 17.
- The interrelationship between the Verizon Wireless acquisition of spectrum from SpectrumCo/Cox and its concurrent acquisition of spectrum from Leap Wireless. *See* Information and Discovery Request No. 18.

The provision of this critical information, along with the other important information requested by the Commission, may create a sufficient record for the public interest analysis to commence. Unfortunately, the timing of the Verizon Wireless response (March 22, 2012) coupled with the inherent delays associated with securing copies of the Highly Confidential material under the applicable protective order procedures, makes it impossible for MetroPCS to

analyze and comment on the information in this reply or to assess whether it is fully responsive to the FCC Discovery.[9] As a consequence, MetroPCS has no choice but to reserve the right to comment on the data after it has been received and MetroPCS has had a reasonable time to conduct a meaningful review.[10]

A. The Applicants' Spectral Efficiency Claims Do Not Resolve the Warehousing Problem

Recognizing that their market-by-market need showing is lacking, the Applicants seek to disprove the warehousing claim by asserting that Verizon Wireless is an industry leader in "spectral efficiency" and thus deserves to be rewarded with additional spectrum. This line of argument fails on several grounds.

First, Verizon Wireless bases its spectral efficiency claim on an aggregate analysis of the national market, using for Verizon Wireless "an average of 89 MHz [of spectrum]…with each megahertz of spectrum serving on average 1.23 million customer connections."[11] This approach is indefensible. There is a need to look at the national market for the purpose of assessing the overall impact of a major transaction on retail competition,[12] but the issue of spectrum

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[9] Counsel to MetroPCS requested copies of the Highly Confidential Verizon Wireless responses on the day they were filed with the Commission (Thursday, March 22, 2012). While counsel has received the written submission, most of the responsive data was submitted by Verizon Wireless in electronic format on disks. Counsel to MetroPCS was advised that these disks would be made available no earlier than Monday, March 26, 2012, the due date for this reply.

[10] Having not seen the data it is impractical for MetroPCS to determine exactly how long it will take MetroPCS to submit it to a critical review. MetroPCS does note that the information appears to be both voluminous and complex, meaning that it will take some time to complete a searching review.

[11] Joint Opposition at p. 24.

[12] For example, in the *AT&T/T-Mobile Staff Analysis*, the staff determined that, because the spectrum screen was triggered in so many markets, anti-competitive harm could be inferred on an aggregate national basis without delving into the specifics in each market. *See* Staff Analysis, para. 34 (appended to *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to*

warehousing necessarily requires a granular, market-by-market analysis. The starting point should not be to factor the total Verizon Wireless customer connections across the average amount of spectrum Verizon Wireless holds nationally, but rather to ascertain how much unused spectrum Verizon has in each overlap market. Since the Verizon Wireless spectral efficiency arguments miss the point, they are meaningless.[13]

Second, even if the Commission considers the Applicants' aggregate national spectrum efficiency claim, which it should not do, it can take no comfort in Verizon Wireless being "the second most spectrally efficient provider post transaction (second only to AT&T…)."[14] Verizon Wireless seems to overlook the fact that the Department of Justice and the FCC both recently disfavored the proposed acquisition of additional spectrum by AT&T from T-Mobile, in part because the alleged spectral and network efficiencies were not credited. And, many challengers to the AT&T/T-Mobile transaction specifically based their objections on the fact that AT&T was a highly inefficient carrier whose alleged need for new spectrum was based upon its failure to upgrade outdated legacy systems to more efficient state-of the art technology. The AT&T/T-Mobile transaction was abandoned by those parties in part as a result of their inability to demonstrate that the alleged consumer benefits from the transaction were real. This being the case, it does not help Verizon Wireless to equate itself with fellow duopolist AT&T in an effort to justify the acquisition of additional spectrum.

Assign or Transfer of Control Licenses and Authorizations, Order, WT Docket No. 11-65, DA 11-1955 (rel. Nov. 29, 2011)) ("*AT&T/T-Mobile Staff Analysis*").

[13] The Applicants' analytical approach is further undermined by the fact that it is comparing itself to other carriers who do not have nationwide spectrum. This is clearly an apples to oranges comparison and holds no weight.

[14] Joint Opposition at p. 24.

Third, the Joint Opposition does the Applicants no good by acknowledging that MetroPCS is an efficient user of the limited spectrum and asking the Commission to give Verizon Wireless credit because it is "again tied with MetroPCS."[15] Because Verizon Wireless has large swaths of spectrum and a large subscriber base, it is able to segregate its services and users in ways that offer some spectral efficiencies. In contrast, MetroPCS is required to intermix a variety of voice services and data services, sometimes on a single 10 MHz channel block. Under these circumstances the Applicant's claim that they are "tied with MetroPCS" hardly serves to justify this transaction. And, unlike Verizon Wireless, MetroPCS does not have a storehouse full of unused spectrum in its markets that already is licensed to it and can be used to meet near term demands. The truth is that MetroPCS and Verizon Wireless will only be "tied," and able to compete effectively on a going forward basis when both hold the additional spectrum they need to meet the ascertainable demands for service of their customers in the near term.

Given the spectrum shortage and its impact on both competition and the ability of others to offer competitive services, the real issue is whether Verizon Wireless needs additional spectrum in the near term to meet unsatisfied demands for service. In resolving this issue, the Commission should accept as true the specific representation Verizon Wireless made in the Applications as filed that it did not need the subject spectrum at least until 2015 and perhaps not until 2019.[16] The Commission should reject out of hand the convenient revisionist history Verizon Wireless offers in the Joint Opposition – formulated in direct response to the multiple serious challenges that were leveled at its need showing – that it needs the spectrum sooner.

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[15] Joint Opposition at p. 26.

[16] SpectrumCo Application, Ex. 1 (Public Interest Statement), p.13.

In sum, even if Verizon Wireless is the most efficient user of spectrum – which is not the case – this should not translate into it being rewarded with permission to warehouse spectrum. And, the Commission is unable, based upon the current record, to conclude that the public interest would be served by allowing Verizon Wireless to add a substantial additional stockpile of spectrum to its already well-stocked warehouse.

III. THE TRAFFICKING ISSUE REMAINS

In addition to pointing out to the Commission the additional information required from Verizon Wireless regarding its use of existing spectrum and its need (if any) for additional bandwidth, MetroPCS demonstrated that SpectrumCo must provide documentary evidence sufficient for the Commission to ascertain whether it acquired its AWS licenses with a *bona fide* intent to construct facilities and provide beneficial services to the public.[17] This MetroPCS position was premised on the facts that (1) having held its AWS license for five years, SpectrumCo has failed to initiate service to the public in any market; and (2) an unambiguous statement by a SpectrumCo insider – Comcast CFO Michael Angelakis – that SpectrumCo "never really intended to build that spectrum."[18]

The Joint Opposition not only fails to adequately address the serious trafficking allegation, it makes matters worse. Faced with a call for documentary evidence demonstrating a serious intention by SpectrumCo to build a broadband system and to operate it in the public interest, the Applicants instead offer unsupported, unconvincing third party rationalizations for the failure of SpectrumCo to build a single market or serve a single customer in over five years. Noticeably absent from the Joint Opposition is any declaration provided under penalty of perjury

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[17] *See* MetroPCS *Ex Parte* Communication, WT Docket No. 12-4, at 2 (filed Jan. 27, 2012).

[18] *See* Josh Wein, *Comcast Never Planned to Build Out AWS Spectrum*, COMMUNICATIONS DAILY, 8 (Jan. 6, 2012)

by Mr. Angelakis – or any other SpectrumCo representative with personal knowledge of the facts – attesting to the serious intention of SpectrumCo to construct and operate a broadband network.

As MetroPCS previously indicated, the question whether SpectrumCo acquired its AWS licenses for the purpose of profitable resale is a simple issue of fact that can be answered through documentary evidence. No doubt there are: (1) minutes of SpectrumCo LLC meetings of the members discussing the company's business plan; (2) internal SpectrumCo management documents discussing the company's business plan; (3) business records of the SpectrumCo members reporting the plans of SpectrumCo to their own management; and (4) business plans of SpectrumCo that were shared with third parties. The FCC Discovery is broad enough to require the Applicants to provide all of this documentary evidence which is absolutely necessary for the Commission to make an independent judgment of the intentions of SpectrumCo.

Absent such additional information, the weak rationalizations and excuses offered by the Applicants in the Joint Opposition for the complete failure of SpectrumCo to provide service to the public are completely inadequate:

a. The Joint Opposition falsely claims that trafficking is not a serious concern in the context of auctioned licenses since winners pay fair value. Here, however, there are unique circumstances. Representatives of Comcast, which is a significant member of SpectrumCo, have themselves put the trafficking issue on the table by public statements – over a six year period – that SpectrumCo and Comcast never had, an intent to buildout the spectrum. Time Warner, another SpectrumCo member, has made matters worse with public statements focused on spectrum value rather than on the operating value of a company providing broadband

services. Under these circumstances, the Commission must be vigilant to police against trafficking particularly in the current environment of extreme spectrum scarcity.[19]

b. The Joint Opposition seeks comfort in a prior Commission pronouncement that trafficking in licenses should be *minimal* "when licenses are acquired in open competitive bidding" and "the transfer of licenses awarded by competitive bidding will *seldom* raise any trafficking concerns."[20] Accepting the Commission observations at face value, the simple fact is that this is one of those rare instances where a robust trafficking inquiry is warranted. The failure to implement any service after an extended period of time and the minimal efforts undertaken to develop the spectrum, coupled with the reported public statements of SpectrumCo representatives indicating a speculative intent, are sufficient to create a *prima facie* case of trafficking that demands inquiry. The situation here is completely distinguishable from the AT&T/Qualcomm transaction which the Applicants cite.[21] In the case of Qualcomm, it developed the spectrum, built networks in the spectrum, and launched service, only to find out that the service was not commercially viable. The same might be said for Cox's efforts here. SpectrumCo, however, is different, there being no evidence that its spectrum was ever put to use or that services ever were provided.

c. The effort of the Applicants to explain away the Angelakis admission in a footnote is completely unsuccessful. The unambiguous public statement that SpectrumCo "*never*

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[19] Every company which submits an auction application, is representing to the Commission that it has a *bona fide* intention to construct and operate the licensed station in the public interest and is not acquiring the spectrum rights for purposes of speculation or profitable resale. See 47 C.F.R. § 1.948(h). If, indeed, SpectrumCo lacked the requisite intent, it filed a false application and misrepresented facts to the Commission. In that case, the Commission must take action and deny the assignment application.

[20] Joint Opposition at p. 36 (emphasis added).

[21] *See* Joint Opposition at p. 31.

really intended to build that spectrum" cannot credibly be claimed merely to "convey the thought process following the years of evaluation and analysis, not SpectrumCo's intentions at the time."[22] Never means never, and this *post hoc* attempt to revise the statement without a supporting affidavit from the speaker falls flat.

d. The reality is that the costs of implementing a nationwide broadband network, and the competitive challenges of doing so, have not changed materially in the five years since SpectrumCo acquired its AWS spectrum. Parties faced with trafficking allegations can respond and justify their actions by citing materially changed circumstances that serve to explain why the applicants' intention changed over time.[23] Here, SpectrumCo has failed to demonstrate a *bona fide* change in position based upon intervening events.[24]

e. SpectrumCo also fails to make an adequate case that the activities it pursued after securing its licenses demonstrated a serious plan to construct and operate a commercial network. The vague assertions that SpectrumCo was "engaged in exploring ways to use AWS spectrum,"[25] ring hollow when other AWS licensee, such as MetroPCS and T-Mobile, built commercial networks using AWS spectrum within a couple of years of grant. MetroPCS received its AWS licenses in November 2006 and initiated service in Las Vegas in March 2008. Similarly, SpectrumCo can get no credit for any payment it made to clear AWS spectrum. First, since

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[22] Joint Opposition at p. 36, n. 104 (emphasis added).

[23] *See* 47 C.F.R § 1.948(i)(2) (allowing an assignor to demonstrate that a license was not acquired principally for the purpose of speculation or profitable resale by showing material "changed circumstances (described in detail) affecting the licensee after the grant of the authorization.") SpectrumCo has utterly failed to make such a showing.

[24] To the extent SpectrumCo uses the duopoly of the current industry, as an excuse that would prove the point of MetroPCS and others that Verizon should not get the spectrum as it would further cement the current duopoly.

[25] Joint Opposition, at p. 36, n. 104.

SpectrumCo is obligated to share in certain spectrum clearing costs incurred by others that benefitted SpectrumCo, it can get no credit for meeting these legally imposed sharing obligations.[26] If it had not done so, it would have been in violation of Commission rules. Second, clearing spectrum could be consistent with an intention to sell the spectrum for a profit rather than to construct and operate a system in its own right.

f. SpectrumCo also can be given no credit for the claim that it has "fully complied with the Commission's buildout rules."[27] The reality is that the Commission adopted an unusually long and unusually low buildout threshold for AWS licenses for two reasons. First, the Commission was concerned about the amount of time that it would take licensees to clear the AWS spectrum of incumbent users, particularly government users.[28] Second, because the AWS frequencies were higher in the spectrum band, there had been less manufacturer development and testing in the band, and there was no immediate off-the-shelf equipment available. Therefore additional buildout time was deemed appropriate. As it turned out, these potential concerns proved to be less serious than anticipated as demonstrated by the impressive records of MetroPCS and T-Mobile in clearing spectrum and bringing commercial AWS systems online promptly after receiving licenses. Had the Commission known what would happen, and fully anticipated the impending spectrum crunch, it no doubt would have implemented more significant AWS build out requirements.[29] Contrary to the claims of the Applicants, MetroPCS

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[26] *See* 47 C.F.R. § 27.1111.

[27] Joint Opposition at p. 40.

[28] *In the Matter of Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands,* Report & Order, WT Docket No. 02-353, 18 FCC Rcd 25162, para. 70 (2008).

[29] This point is aptly demonstrated by the fact that the Commission adopted a much stricter interim buildout requirement in the 700 MHz band. *Compare* 47 C.F.R. § 27.14 (a)

is not contending that the Commission should impose stricter buildout requirements on SpectrumCo, after the fact, in the context of this transfer application. MetroPCS is contending that SpectrumCo can take no credit – and cannot defend against the well-founded trafficking claim – simply by stating that it is in "compliance" with the AWS buildout requirements that only kick in 15 years after grant and that, in hindsight, were not as meaningful as they could have been.

Once again, the Bureau deserves credit for having recognized the patent inadequacy of the information provided to date by SpectrumCo with regard to the *bona fides* of its intention to construct and operate broadband wireless networks in the public interest. The Bureau letters of March 8, 2012, to the members of SpectrumCo[30] make detailed requests for information covering much of the information originally identified by MetroPCS as essential to evaluating a possible trafficking claim, including:

- All plans, analyses and reports on any options the participants considered to enter the wireless market from January 31 to the present. *See, e.g.,* Bright House Information and Discovery Request No. 3.
- All documents from January 31, 2006 to the present discussing SpectrumCo's efforts or plans to use the AWS spectrum, and its decision not to build a stand-alone system. *See, e.g.,* Bright House Information and Discovery Request No. 15.

(establishing the AWS substantial service buildout requirement at the 15 year renewal point) *with* 27.14 (g) (requiring coverage of 35% of the geography in four years).

[30] *See* Letters from Rick Kaplan, Wireless Telecommunications Bureau, to Bright House Networks, LLC, Comcast Corporation, Time Warner Cable, Inc. and Cox TMI Wireless, LLC, WT Docket No. 12-4 (Mar. 8, 2012) (Information and Discovery Requests).

- All efforts of SpectrumCo to shop the AWS spectrum. *See, e.g.,* Bright House Information and Discovery Request No.16.
- All documents pertaining to the statements of Comcast CFO Michael Angelakis regarding the intentions (or lack of intention) of SpectrumCo and its members to use the AWS spectrum. *See, e.g.* Bright House Information and Discovery Request No. 17.

Once again, however, the timing of the responses of the members of SpectrumCo (March 22, 2012) coupled with the inherent delays associated with securing copies of the Highly Confidential material subject to the applicable protective order procedures, has rendered it impossible for MetroPCS to analyze and comment on the information in this reply.[31]

IV. ANY GRANT MUST BE SUBJECT TO MEANINGFUL ROAMING CONDITIONS

For the reasons set forth above, the Commission cannot at present find that a grant of the Applications would serve the public interest. Yet, even if the Applicants address the unresolved warehousing and trafficking issues by providing the requested information, the Commission nonetheless will need to condition the proposed transaction with regard to roaming. In the proposed transaction, Verizon Wireless has agreed to allow the selling parties to be agents for Verizon Wireless and also to resell Verizon's wireless services [begin highly confidential material] [redacted] [end highly confidential material]. Since the proposed Transactions will remove an important constraint on Verizon Wireless's ability to

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[31] Counsel to MetroPCS requested copies of the unredacted Highly Confidential responses on the day they were filed with the Commission (Thursday, March 22, 2012) but was advised that they would be made available no earlier than Monday, March, 26 2012, the due date for this reply. As a result, MetroPCS must reserve the right to comment on the information after it has been received and MetroPCS has had a reasonable time to conduct a meaningful review.

charge super competitive rates for roaming, any grant must be conditioned with appropriate roaming conditions. Specifically, Verizon Wireless must be required to offer roaming to other carriers at rates no less favorable than the resale rates offered to the sellers in the Transactions under the disclosed Commercial Agreements.

Multiple interested parties have challenged the Transactions based upon the anticompetitive impact that they will have on the market for roaming services.[32] The arguments are easily stated. Verizon Wireless has been a relentless opponent of both voice and data roaming obligations, as has been manifested most recently by Verizon Wireless being the only carrier to appeal the Commission's data roaming order.[33] This appeal is a clear statement that Verizon Wireless is unwilling to offer data roaming services to other carriers on commercially reasonable terms. And, this unwillingness has been documented in repeated filings with the Commission by small, mid-sized and larger carriers.[34] Indeed, the Commission need look no further than the admissions of the Applicants here to establish this point. SpectrumCo has sought, in part, to justify its decision to exit the wireless marketplace as a facilities-based competitor because "securing roaming agreements posed another complication factor."[35] A

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[32] *See,* Petition to Condition or Otherwise Deny of RCA – The Competitive Carriers Association ("RCA Petition") at p. 35, 56; Petition to Deny of NTCH ("NTCH Petition") at p. 6-7; Petition to Deny of Free Press at p. 48.

[33] *See Cellco Partnership v. FCC*, Case Nos. 11-1135 & 11-1136 (DC Cir.)

[34] *See,* Comments of MetroPCS Communications Inc., National Telecommunications Cooperative Association, NTELOS Holdings Corp., PRWireless, Inc., Revol Wireless, the Rural Cellular Association, and United States Cellular Corporation in Support of the Blanca Telephone Company Petition for Reconsideration, WT Docket No. 05-265 (filed Dec. 16, 2011) (advocating the imposition of a shot clock on roaming negotiations based, *inter alia,* upon the failure of Verizon Wireless to offer voice and data roaming on a timely basis on reasonable terms and conditions).

[35] Verizon SpectrumCo Application, Exhibit 1, Attachment 4 (Declaration of Robert Pick) at para. 14. To its credit, the Bureau has recognized the highly troubling nature of the prospect that

Comcast principal put it even more bluntly: "access to roaming agreements is *next to impossible.*"[36]

The problem facing the Commission is that the proposed Transactions would aggravate an already dire roaming situation in three principal respects. First, the Transactions would remove from the marketplace four significant potential roaming partners who could serve to deter Verizon Wireless' anticompetitive behavior. Recently, the Commission has expressly recognized that, in a consolidating market, it must take "a more extensive view of *potential and future competition* and the impact on the relevant market, including longer term impacts."[37] Similarly, the Department of Justice merger guidelines require it to look at "both incumbents *and identifiable prospective competitors with the resources to compete effectively*" when analyzing a relevant market.[38] Here, the selling cable companies have the spectrum, financial, human, technical, and other resources necessary to create a fifth nationwide competitor in the wireless broadband market. And, they have acknowledged that they would have powerful business incentives when they enter the market to enter into roaming agreements with third parties in order to compete with the two major wireless carriers.

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the cable companies are being forced out of the market as facilities-based competitors by the refusal of Verizon Wireless to enter into reasonable roaming arrangements, and in its Information and Discovery Requests to the sellers obligates them to describe in detail all their efforts to enter into roaming agreements. Once again, MetroPCS is unable to comment on their responses because they are not being made available in time for it to do so. Consequently, MetroPCS must reserve the right to comment on these responses at a future date.

[36] Eliza Krigman, *Comcast Executive Defends Verizon SpectrumCo Deal*, POLITICO, (Mar. 8, 2012) (emphasis added).

[37] *Application of AT&T Inc. and Qualcomm Incorporated For Consent To Assign Licenses and Authorizations*, Order, WT Docket No. 11-18, FCC 11-188, ¶ 25 (rel. Dec. 22, 2011) ("*AT&T/Qualcomm Order*") (emphasis added).

[38] DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, § 5.3 (Aug. 19, 2010), *available at:* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("*DOJ Horizontal Merger Guidelines*") (emphasis added).

The potential loss of the cable companies as roaming partners is particularly harmful because they would likely implement 4G LTE networks on the AWS spectrum which would be interoperable with many other carriers and provide an efficient and attractive roaming option. As the Commission has recognized, interoperability between channels held by different carriers is an important driver of competition as it allows carriers to achieve better economies of scale. The proposed Transactions threaten to take the AWS spectrum away as a potential LTE roaming opportunity. At present, Verizon Wireless is deploying LTE on its Upper C Block 700 MHz spectrum which presents an interoperability problem. If competitors can get roaming from Verizon Wireless they will be forced to buy handsets that work only on Verizon Wireless's Upper C Block 700 MHz spectrum and not on the lower band 700 MHz channels held by others. Under these circumstances, the loss of these potential roaming partners is a matter of serious concern, particularly in light of the fact that the Commission has "unique statutory obligations, distinct from the DOJ, to consider the potential anticompetitive effects of proposed acquisitions of spectrum that is used in the provision of mobile services."[39]

Second, approval of the Transactions would remove one of the only remaining incentives for Verizon Wireless to enter into reasonable roaming arrangements. Because Verizon Wireless has nationwide spectrum and a national footprint, it has no business incentive to enter into roaming agreements with other carriers for the purpose of extending its footprint – which was the principal driver of roaming agreements in the earlier stages of the development of wireless services. Some carriers have, however, had a small measure of success in getting modest (though still inadequate) roaming concessions from Verizon Wireless when the requesting party had something else Verizon Wireless wanted – i.e. spectrum in a particular locale. For example,

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[39] *AT&T/Qualcomm Order* at para. 30, n. 88.

it is no coincidence that Verizon Wireless first agreed to provide roaming to MetroPCS at the same time it acquired spectrum from MetroPCS in San Francisco.[40] If, however, the Commission allows Verizon Wireless to add the vast store of SpectrumCo, Cox and Leap licenses to the already well-stocked Verizon Wireless spectrum warehouse, the Commission will have removed one of the few remaining incentives for Verizon Wireless to engage in roaming discussions. Effectively, Verizon Wireless will have acquired sufficient spectrum to be able to remove itself from the secondary market indefinitely which will stifle the few roaming prospects other carriers might have had.

Third, the roaming market is broken because there is no equality of bargaining power between Verizon Wireless on the one hand and the parties seeking roaming services from Verizon Wireless on the other hand. Approving the Transactions would exacerbate this inequality by adding immeasurably to the market power of Verizon Wireless on both a national basis and in local markets throughout the nation. The effective wireless duopoly of Verizon Wireless and AT&T will be strengthened to the detriment of all competing carriers who need reasonable roaming arrangements to survive.

The Joint Opposition gives short shrift to these serious concerns. The Applicants claim, incorrectly, that the opponents of the Transactions "fail to demonstrate how the spectrum acquisition will impact roaming in any way," falling back on the tired refrain that a spectrum-only transaction does not result in the loss of any current roaming partner.[41] MetroPCS can only assume that the Applicants chose to ignore the obvious fact that the Transaction is removing

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[40] Unfortunately, the rates Verizon offered are so high that MetroPCS' roaming rates to its customers are many multiples higher than Verizon Wireless is able to offer to its own customers.

[41] Joint Opposition at p. 63.

important potential roaming partners from the market because they have no substantive response. The simple fact is that, if SpectrumCo built a network, it would have every intention to provide roaming on reasonable terms and conditions.

Verizon Wireless next seeks to avoid the roaming issue by asserting that the Commission has dealt with roaming issues "comprehensively" in the roaming docket and that issues of this nature are "best left to broad industry-wide proceedings" and to complaint proceedings as permitted in the *Data Roaming Order.*[42] The Commission can give no serious attention to this defense. Verizon Wireless has given no indication that it intends to dismiss its appeal of the *Data Roaming Order.* It is, therefore, a transparent sleight of hand for Verizon Wireless to hold up that *Order* as the sole basis of the opponents' roaming relief while it is striving to cause that *Order* to disappear. Moreover, the relief that requesting carriers could get in a roaming complaint proceeding would not address the structural problems in the roaming market that have caused the market to cease fostering agreements.[43]

In any event, the Commission has made it clear on prior occasions that, in certain circumstances, it is in the public interest to place roaming conditions on a buyer of wireless

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[42] Joint Opposition at p. 65. One aspect of the Commission's *Data Roaming Order* that has deterred carriers from filing complaints is that the two dominant nationwide carriers have sufficient power to dictate the terms of roaming agreements. They no doubt will claim that these allegedly voluntary agreements establish the benchmark for what is "commercially reasonable". In effect, the foxes are guarding the chicken coop.

[43] There are a variety of reasons why complaints have not yet been filed, including the facts that the applicable rules are still in play, carriers are concerned about retaliatory action (e.g., cancellation by Verizon of the roaming rates inherited from ALLTEL at the earliest possible date), the indefiniteness of the commercially reasonable standard in the light of the "factors" the Commission has cited as the costs of a formal complaint proceeding.

spectrum in order to mitigate the potentially anticompetitive effects of a transaction.[44] Indeed, the Commission previously has properly found that the adoption of its roaming rules "does not … obviate the need to consider whether there is any potential roaming-related harm that might arise" from a transaction.[45]

In sum, if the Commission gets to a point in the future where the other serious questions about the Transaction have been answered satisfactorily, a roaming condition, as set forth below, is essential.

A. Verizon Wireless Should Be Obligated to Offer Roaming to Other Carriers at Rates No Less Favorable than the Resale Rates Offered to the Sellers

The core problem in the roaming market today is the absence of equal bargaining power between the dominant nationwide carriers and the smaller requesting carriers. There are, however, certain combinations of circumstances which arise on occasion and serve to level the playing field temporarily. For example, one can surmise that T-Mobile enjoyed some measure of bargaining power when it was negotiating the roaming agreement with AT&T that was an element of the break-up fee in the AT&T/T-Mobile transaction. Because AT&T had a powerful business incentive to reach an agreement with T-Mobile on the buy-out, the roaming rates reflected in the roaming agreement in the event of a break-up might be expected to be more commercially reasonable than the rates AT&T would offer T-Mobile in the absence of the proposed buy-out.

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[44] *See, e.g., In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, 23 FCC Rcd 17444 (2008) (approving the Verizon Wireless acquisition of ALLTEL subject to roaming conditions requiring Verizon Wireless to retain certain rates offered by ALLTEL).

[45] *AT&T/Qualcomm Order* ¶ 57.

Similarly, the Commission can reasonably expect that the wireless resale rates offered by Verizon Wireless to the cable companies pursuant to the reported Commercial Agreements reflect an arms-length arrangement since both sides had bargaining leverage and a desire to get a deal done. This is significant because of the many inherent similarities in the cost elements and avoided costs that should go into establishing a commercially reasonable rate to charge a third party for resale access to one's network, and the cost elements and avoided costs that pertain to roaming access. For example, the largest single category of cost elements, which is equally applicable in both the roaming and resale contexts, is the cost of constructing and operating the underlying network (equipment costs, site costs, maintenance costs, personnel costs, intercarrier costs, etc.) to which the roaming customer or resale customer has access. As to avoided costs, in both the roaming and resale contexts the substantial costs associated with billing the end user customer and collecting from the customer are borne by the roaming or resale carrier, not the underlying carrier Verizon Wireless. Similarly, since both the roaming carrier and resale carrier are responsible for providing their customers with equipment, the substantial costs associated with equipment inventory, equipment subsidies and costs of goods sold, are removed from the equation in both the roaming and resale contexts. In sum, all of the major cost elements that must be considered in determining a reasonable and appropriate cost-based rate for allowing access to a wireless broadband network are similarly treated both with respect to resale and roaming arrangements. Thus, an arm's length resale rate provides a good proxy for a fair roaming rate.

If anything, the burden placed on the underlying carrier by a resale arrangement is greater than that imposed by a roaming relationship. Because resellers have no core facilities of their own, they are more dependent on the underlying carrier and their resale customers are more

closely aligned with the underlying network carrier. Thus, costs incurred by the underlying carrier with regard to customer support, marketing and brand promotion, and numbering administration are more pertinent to the resale carrier than to the roaming carrier. In addition, sales and administrative costs associated with resale are greater than with roaming. And, perhaps most important, resale customers will put a greater capacity burden on the Verizon Wireless network because, unlike the roaming customer, there is no alternative home network to which the customer can retreat. Accordingly, the resale costs are actually higher than roaming costs – and therefore a ceiling at the resale rates would be appropriate.

Under these circumstances, given the substantial negative impact of the proposed Transactions on the roaming market, at the very least Verizon Wireless should be obligated to offer roaming services to other carriers on financial terms no less favorable than the resale terms offered to the sellers in the transactions. Specifically, [begin highly confidential information]

Service	Rate
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[end highly confidential information].

B. Additional Information Should Be Required From Verizon Wireless

In order to properly assess the Transactions, the Commission must require Verizon Wireless to disclose the voice and data roaming rates that it is charging and has offered to other facility-based carriers so that the Commission can compare them to the resale rates offered to the cable companies. If, as MetroPCS suspects is the case, the resale rates are uniformly and dramatically lower than the roaming rates Verizon Wireless is offering, serious questions arise. For example, if the Commission assumes that the resale rates are compensatory, which should be

the case,[46] the differential will prove the point that MetroPCS has been making all along: that the roaming market is broken and that Verizon Wireless is seeking to disadvantage its facility-based competitors by denying them reasonable roaming agreements.

The requested data also would enable the Commission to make a meaningful independent assessment of the roaming rates that Verizon Wireless is offering to competing carriers as compared to the resale rates it is offering to the cable companies. Due to confidentiality provisions governing roaming agreements, carriers naturally are reluctant to engage in a robust discussion regarding the roaming rates they have been offered or receive. The information identified by MetroPCS would enable the Commission to conduct its own fact-based inquiry into this important topic.

Notably, having Verizon Wireless provide this relevant roaming information will not unfairly burden or prejudice the Applicants. The supplied information would be subject to the strict confidentiality procedures that already are in place in this proceeding, and thus Verizon Wireless can raise no competitive or confidentiality concerns. Moreover, since Verizon Wireless no doubt maintains an up-to-date master file of its roaming arrangements and offers, supplying the requested information will not unduly burden the Applicants. Thus, the balance of equities favors requiring Verizon Wireless to supply this high relevant information.

Having Verizon Wireless supply this roaming information would have incidental benefits as well. In this case, SpectrumCo has argued that the roaming rates and the prospect of getting a roaming agreement was one of the major factors that drove SpectrumCo to sell. If the Commission was able to compare the rates that Verizon Wireless is offering to others and the

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[46] Serious issues would arise if Verizon Wireless was offering the cable companies a below cost resale rate. In effect, Verizon Wireless would be paying the cable companies a premium in order to eliminate them as potential facilities-based competitors.

resale rates that Verizon Wireless has offered SpectrumCo, the Commission would be in a better position to determine whether that offered explanation is true.

V. CONCLUSION

In sum, the Applicants have failed to cure the fatal deficiencies in the Applications and at this point, the Applications must be denied because the Commission cannot make the requisite public interest finding.

Respectfully submitted,

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March 26, 2012

CERTIFICATE OF SERVICE

I, Carl W. Northrop, hereby certify that on the 26th day of March, 2012, I caused a true and correct copy of the foregoing Reply to Joint Opposition to Petitions to Deny and Comments to be sent by electronic mail to:

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